No. 223.

Brf. of Mahan for D. E.

Office Supreme Court
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JAMES H. McKENNEY,
Clerk

Filed Mar. 17, 1902.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1901.

No. 223.

LEE CLARK, PLAINTIFF IN ERROR,

against

MONROE D. HERINGTON, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF OF DEFENDANT IN ERROR.

J. H. MAHAN,
Attorney for Defendant in Error.

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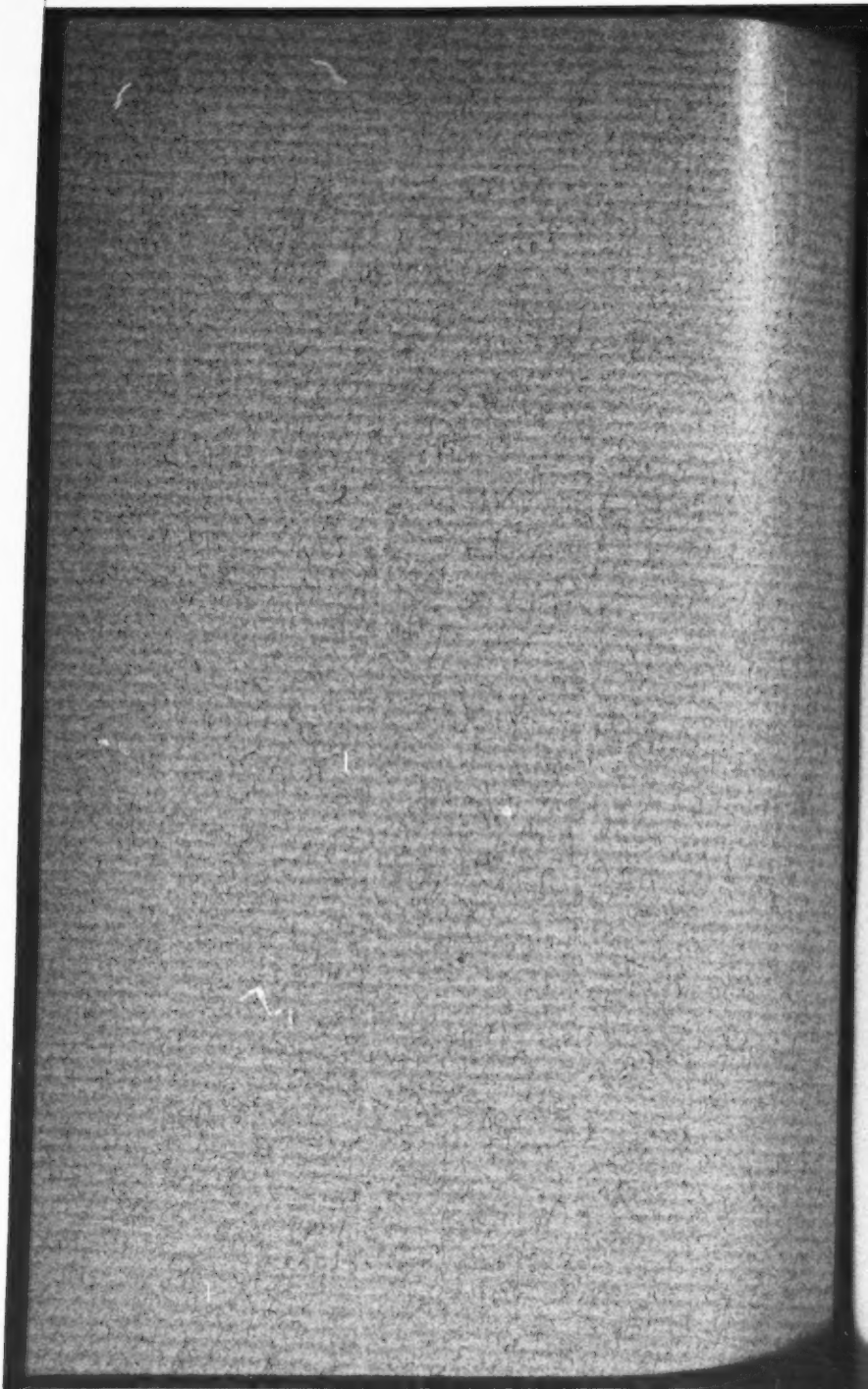


IN THE

Supreme Court of the United States,

OCTOBER TERM, 1901.

No. 223

LEE CLARK, PLAINTIFF IN ERROR,

vs

MONROE D. HERINGTON, DEFENDANT IN ERROR.

ADDITIONAL BRIFF OF DEFENDANT IN ERROR.

The brief of plaintiff in error having been received by me this morning, March 7th, 1902, I beg leave of the Court to add to my brief on behalf of the defendant in error the matter following:

On page 2 of plaintiff's brief is this statement: "It is "claimed by the defendant in error that the land is" "also within the limits of the grant to the Union" "Pacific Railroad Company of July 1, 1862, (12 Stat." "at Large, 489; also App. A), and the act amendatory"

"thereof of July 2, 1864 (13 Stat. at Large, 356; also"
"App. B). But there is nothing in the record to"
"show this fact, except a reference to it in commis-"
"sioner's letter 'F,' dated May 13th, 1886, which reads"
"as follows :"

The 8th specification of error on page 17 of the brief is, the Supreme Court of Kansas erred in deciding that the land was within the limits of this grant.

In the brief filed in the State Supreme Court on page 9 written by same Counsel occurs this language: "The land is within the limits of the grant to the Union Pacific road, but, being an even numbered section was not covered by the terms of any of the grants to that road." In corroboration of this I have a copy of that brief with the filing mark of the Clerk of that Court which is herewith submitted.

Permit me to say further that this fact never has been controverted before, but has on the contrary on all occasions been treated as an undisputed fact. It is the very pivotal fact upon which the decision is based. The language of counsel now is that the fact was merely referred to by the acting Commissioner in his letter "F." My conception of this letter is that it is a finding of facts and conclusions of law upon a matter within the jurisdiction of the officer conferred by acts of Congress and sustained by the decisions of this Court; an adjudication, from which an appeal was allowed but not taken—see 21 agreed fact p. 18 printed record. This finding of fact by that officer,

the state court was bound to treat as final, conclusive, as to the M. K. & T. R. R. and those claiming under it.

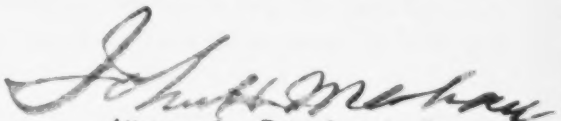
That the attempted selection and certificate from the local land office did not operate to convey title, as argued under the first subdivision of the argument, I call attention to Wisconsin R. R. Co. vs. Price County 133 U. S. p. 511 et seq. deciding that the approval of the Secretary of the Interior was essential to this operation. It is not contended that there was an approval by the Secretary of the Interior, nor was such approval ever had. It is said on page 12, of brief "no claims of want of authority in the department is made". On the contrary, it is upon this want of authority that we grounded this case in the beginning and have stood thereon since. It is the crucial question of the case—see second par. of reply, page 15 printed record.

On page 16 of the brief the date of the eviction of defendant in error is correctly fixed as July 31, 1886. Yet the contention of *bona fide* purchaser under the 2d subdivision of the argument is based on the Act of Congress of 1887 and this Court's decisions thereunder principally. There can be no successful claim of *bona fide* purchaser, in the face of the Act of Congress of 1868, expressly reserving this land as double minimum land.

In response to the last statement on the last page of the brief permit me again to reiterate that the eviction was July 31, 1886; that it was a forcible eviction and

not collusive, see the 17th agreed statement of fact; that it occurred almost a year before the act of March 3, 1887, was passed; that this action was begun in 1889, more than 3 years after the eviction. So that the suggestion of collusion between the plaintiff and the homesteaders is not justified by any fact.

The defendant in error yielded to the authority of the Federal Government; the land was patented to the homesteaders and for almost 13 years he has been contending against the railway company for a restitution of the money he paid for the land and which went into its coffers, by reason of its unauthorized endeavor to procure land to which it had no color of right.



Attorney for Defendant in Error.